COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
Case No. 42990-0-II

JASON EHLERT,
Respondent,
And
MARIA SPURIA-EHLERT,
Appellant.

Brief of Appellant Maria Spuria-Ehlert

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it applied a "50/50" residential placement theory to the parenting plan without addressing the mandatory RCW 26.09.187(3) factors, which are necessary to evaluate the children's best interests.

2. The trial court erred when it directed a "50/50" residential placement structure when there was no evidence to support the ruling under RCW 26.09.187(3), and where there was overwhelming evidence that the childrens' best interests would be served by awarding primary residential placement to the mother.

3. The trial court erred when it rejected the credibility of all witnesses, ignored the recommendations of the guardian ad litem, and simply resorted to a "50 / 50" residential placement plan under the parenting plan.

4. The trial court erred when it ruled that the children's life in Australia was irrelevant, even though that was the nation of their birth, their citizenship, and an extended family that all parties agreed was loving and supportive.

5. The trial court erred when it ruled that the children's life in

Australia was irrelevant, even though neither parent had citizenship in the United States, the underlying basis for the father's continuing residence in the United States was false and nonexistent, and the residency visas were expiring.

6. The trial court erred when it entered awarded primary residential placement to "both" parents without entering or discussing the findings of fact required under RCW 26.09.187(3).

7. The trial court erred when it entered a parenting plan that favored the "status quo" of a temporary residential placement arrangement in Pierce County instead of the multi-factor analysis required under RCW 26.09.187(3).

8. The trial court erred when it failed to award primary residential placement to the mother without considering the father's: (1) unrepentant lack of judgment in confusing his children with a live-in-girlfriend during his custodial time, (2) stubborn refusal to engage in parental counseling despite the guardian ad litem's recommendations; and (3) his admitted failures to involve the children in enriching activities?

9. The trial court erred when, after finding the father in contempt, it failed to award mandatory attorney's fees needed to reimburse the mother for bringing the motion.

II. ISSUES

1. Did the trial court abuse its discretion when it entered a "50/50" parenting plan without analyzing the factors required for determining a child's best interests under RCW 26.09.187(3)?
2. Did the trial court abuse its discretion when it entered a "50/50" parenting plan based on factors inconsistent with the legal standard for determining a child's best interests?
3. Did the trial court abuse its discretion by entering a "50/50" parenting plan where no evidence supported that determination under RCW 26.09.187(3), and where overwhelming evidence favored placement with the mother?
4. Did the trial court abuse its discretion when it refused to award reasonable legal expenses under RCW 26.09.160 to reimburse a mother forced to bring a contempt motion after discovering the father's illegal criminal recording of her private life?

III. STATEMENT OF THE CASE

Maria Spuria-Ehlert is a citizen of Australia and Jason Ehlert is a

citizen of Canada. Verbatim Report of Proceedings I ("VRP I"), pp. 100, 102; Exhibits 1, 4, 24, and 26. Maria and Jason were married on March 5, 2005 at Rock Bank, Victoria in Australia. Clerk's Papers ("CP") 2. Their children, Jaxon and Phynix, are also citizens of Australia. Exhibits 5, 27 and 28. VRP I, p. 100.

Maria and Jason met in 2002 while traveling for Savers, their common employer at the time. VRP I, pp. 102-103. Shortly after meeting, the couple decided that they wanted to live together in Australia. VRP I, p. 103. Their plan to make Australia their home was delayed when Savers refused to reassign Jason to Australia. Accordingly, the couple decided to live in the United States for a time. VRP I, p. 103.

Eventually, Jason left Savers and the couple moved to Australia, where they followed their plan to establishing a supportive home for raising a family. VRP I, pp. 15-18, 99, 105-106, 114; VRP III, p. 82. Jason got a job with Maria's uncle and easily immigrated to Australia with his Canadian citizenship. VRP I, pp. 112-113; VRP II, p. 121.

Their first child, Jaxon, was born on September 8, 2006. Exhibit 5; VRP I, p. 99. At that time the family's new home was still under construction, and they lived with the support of relatives. VRP I, pp. 108-110. Four months after Jaxon's birth the home was complete, and the

young family moved in. VRP I, p. 110. Their home was in a new development, with a community that included new schools and sports facilities. VRP I, pp. 105-109. Phynix, their second son, was born on May 31, 2008. Exhibit 5; VRP I, p. 114.

Living In Australia. The children thrived in Australia. They were part of a large and supportive extended family. VRP I, pp. 100-101; Exhibit 35. This extended family included maternal grandparents, an uncle, and Maria's four aunts and uncles, nieces and nephew, seven cousins and others. Id. Jaxon and Phynix developed close connections to many young relatives and friends who were close in age. See VRP I, pp. 105-109. The extended family spent a great deal of time together. Jaxon and Phynix' grandparents were instrumental in their lives, and continue to be so today. VRP I, pp. 43, 117.

Shortly after Jaxon's birth Maria joined a mother's group with six other women who had children born within weeks of each other. They spent one day each week together, and the children became friends as they grew up with one another. Maria and three of the mothers have continued to maintain contact with one another, and with their children. VRP I, p. 114.

To this day the children's father, Jason, acknowledges that the children loved being in Australia with their grandmother and the rest of the

children. Jason speaks fondly of the family's love for the little boys, noting there was "definitely no end of interest in them." VRP I, p.43.

In addition to this rich community of support, Australia continues to offer important governmental benefits for Jaxon and Phynix. As naturally born Australian citizens, the children receive: (1) free medical care[1]; (2) a family tax benefit of bi-weekly payments; and (3) childcare expense rebates designed to encourage working mothers. VRP III, pp. 4-5; CP 43; Exhibits 39- 42.

Jason's Family. Jason's family includes a mother and stepfather in Dunster, Canada, which is between Jasper, Alberta and Prince George. VRP II, p. 117; VRP III, p. 75. Jason also has twin boys from a prior marriage who reside in Utah. CP 31; VRP II, 117. Jaxon and Phynix have spent relatively little time with Jason's family members. VRP II, p. 117; CP 31.

Parenting. Since their birth, Maria has consistently made Jaxon and Phynix the priority and centerpiece of her life. See, e.g., VRP I, p. 110-122; Exhibit 67 (Guardian Ad Litem Report). She has been actively involved with their school and extracurricular activities, and devoted to fostering their healthy development. As a working mother Maria has

11 The family does not have health insurance within the United States. VRP III, p. 11.

successfully structured her life in a manner that has allowed her to fulfill the various important responsibilities of parenting. See, e.g., VRP I, p. 117.

When Jaxon was born Maria took three months of maternity leave, and was able to work from home two or three days a week. During this time she was a stay-at-home mother continuously. VRP I, p. 110. On the days Maria went into the office, Jaxon was looked after by Maria's mother and an aunt and uncle, as well as her sister. This family support was structured. VRP I, pp. 110-111 & 113.

Ultimately, Maria left her position at Savers so that she could focus more time on family with the flexibility of developing her own businesses at the same time. VRP I, pp. 115-116, 117. By the time Phynix was born Maria was a stay-at-home mother working out of her home office. By running her own business Maria had the flexibility to spend time with the children during the day, and would engage them in play dates, and visits with family and friends. VRP I, pp. 120-122. When the children reached school age, Maria became actively involved, volunteering at their school. See VRP II, p. 17. Jaxon and Phynix appreciated Maria's involvement with their activities, and were very engaged with her as a result of her efforts. See VRP II, p. 21; Exhibit 67 (guardian ad litem report).

In addition to her success as a dedicated mother, Maria is a successful business woman whose income has financed the bulk of the family's living expenses, as well as Jason's child support obligations to the twins of his previous marriage, and his student loan. VRP III, pp. 7-10, 12.

Jason Forfeits United States Residency. In January of 2007, Maria, Jason and Jaxon traveled to the United States to work on developing infrastructure for their business. CP 36. The couple assumed that Jason's earlier United States' residency status (based on his prior marriage) was still in effect. See Exhibit 23; VRP I, p. 13. However, upon arrival at the Los Angeles airport, authorities detained Jason and informed him that his resident alien status had been canceled because of his long term residency in Australia. CP 36; VRP I, p. 24, VRP III, pp. 80-81. To continue with the trip, Jason voluntarily gave up his resident alien status in the United States. Exhibit 24; VRP III, p. 81. After forfeiting his rights Jason was allowed to proceed with the trip, and then return home to Australia.

The E2 Investor's Visa. In 2008, Jason and Maria made plans to return to the United States again, to spend some time further developing their international business. CP 37-38. Jason sought the help of immigration attorneys who prepared an application for an "E2 Investor's Visa". See VRP I, pp. 86-87; VRP II, pp. 88-90; Exhibits 1-29. For an

"E2" Investor's Visa, Jason required governmental approval of a specific and ongoing plan of business involving substantial investment in the United States economy. See VRP III, pp. 62, 79; VRP II, p. 93; Exhibits 7 and 22.

Jason based his Visa application on a business named "Frontier Commodities", which would focus on cardboard recycling. VRP III, pp. 82-83. Frontier had an opportunity to do business with the Weyerhaeuser Company, recycling cardboard. VRP III, p. 83. To satisfy federal immigration requirements Jason supplied a five year business plan, with projected sales, growth and employment numbers. VRP III, p. 62. Jason also convinced the United States government he was a majority owner of Frontier. See VRP III, pp. 63, 79 and 90-91. To do so, Jason misrepresented himself as a 70% owner in Frontier, a cardboard recycling business on which his application was based. VRP II, pp. 90-91. The other 50% owners of Frontier understood that Jason's misrepresentation was merely to "facilitate the immigration process." VRP III, p. 91. The family's right to remain in the United States depends on Jason's work at Frontier pursuant to this E2 Investor's Visa. See Exhibits 25-29.

Despite three years of effort, the Frontier Commodities business had failed to satisfy the United States' guidelines, and the government's requirement of a significant contribution to the American economy. VRP

II, p. 121; VRP III, pp. 21-22, 62. Ultimately, Frontier's opportunity to work with Weyerhaeuser evaporated, and the business on which Jason's application was based ceased operation. VRP III, p. 83. "The market was not there for any of it, the business ceased." VRP III, p. 96 (Jason Elhert testimony); see also VRP III, pp. 97-100.

Since the admitted failure of Frontier's business plan, Jason has begun thinking about a new consulting business to support his continued presence in the United States. However, unlike the required detailed information on which is prior Visa was based, Jason does not have any formal or written plan for a consulting business, does not have any clients and, in effect, he does not have any business. See VRP III, pp. 100-102.

Marriage Problems and Separation. In 2008, during Maria's pregnancy with Phynix, she noticed deterioration in Jason's attitude towards her, his responsibilities to his family, and his work. CP 37. Maria was also concerned with Jason's marijuana usage. CP 40-41, 124. In June of 2008, shortly after Phynix was born, Jason left his employment. This created additional stress for Maria, who was now the primary breadwinner in addition to performing a substantial portion of the family responsibilities. See CP 37. Another blow to the marriage occurred when Maria discovered that Jason was visiting pornographic sites on the internet,

as well as inappropriate Craigslist sites involving young girls. See CP 41; VRP I, pp. 83-89 (Jason Elhert testimony). This activity further undermined the relationship, and led to intimacy problems. CP 40-41. There were reports (disputed) of verbal and physical abusiveness. CP 40.

In August of 2010, Maria began living separately from Jason under the same roof. CP 41. The couple tried counseling through December of 2010, but there was a great deal of distance in the home. VRP I, p. 44 (Jason Elhert testimony); VRP III, p. 65. The situation in the household was tense, stressful and isolating for the family, and negatively impacted the children. VRP III, p. 55.

The Trip to Australia. In December of 2010, Maria proposed a family trip to Australia for her father's 60th Birthday. Jason was invited to attend. VRP III, pp. 53-54; Exhibit 36. Jason declined, and informed Maria that she should go herself with the boys. In early 2011 Maria traveled to Australia with the boys. While in Australia, the children quickly reconnected with their extended family, responding well to the positive environment of familial contact, love, and stability. VRP III, p. 55. The children were happier, brighter, more attentive, and less stressed. VRP III, p. 56. They listened better, coped better, slept better, and learned better. VRP III, p. 56. Maria mentioned the positive developments with

her husband, and encouraged him to come to Australia many times. She hoped to partner with Jason on a positive environment for their children, in the country of their birth and citizenship. VRP III, p. 56. At the time of these discussions, Jason remained unemployed in a recessionary economy where the basis for his Visa did not exist. VRP III, p. 57. Still, Jason declined.

The 60th birthday party was unexpectedly delayed by a family tragedy. In addition, Maria was asked to serve as bridesmaid in her sister's wedding on April 16, 2011. Maria informed Jason that rather than repeat Australia trips in the same year, she intended to stay in Australia until her sister's April 16 wedding. VRP III, pp. 57-58. Jason was invited to the wedding, but said he was not interested in attending. VRP III, p. 57.

Procedural History

On March 30, 2011, Jason petitioned the Pierce County Superior Court for a legal separation, two weeks before Maria was to serve as bridesmaid in her sister's wedding. CP 1-8. Jason obtained an ex parte restraining order for Maria's immediate return of the children to reside with him. CP 22. When Maria learned of Jason's legal action she immediately obtained counsel who filed an expedited response on her behalf. CP 23-25. The court set an order for May, 2012 on which to decide its

jurisdiction over Jason's petition. CP 20. After obtaining local counsel Maria submitted to the trial court's jurisdiction, and returned to Washington with the children. See VRP III, pp. 58-59; CP 47. She counter petitioned for a parenting plan in the best interest of the children, and a fair and equitable division of assets and liabilities. CP 64-66.

Mikelle. When Maria returned from Australia with the children she sought to rotate residential time with Jason in the family's United States home. See VRP (July 13, 2011). Jason, however, was already enjoying his time with the children while living with his new girlfriend, Mikelle. VRP (July 13, 2011), p. 9; CP 68; CP 86-88. The guardian ad litem recommended that the rotational time be allowed, and further recommended against Jason's decision to expose the children to Mikelle, his new live-in-girlfriend. VRP (July 13, 2011), pp. 9-10. The GAL noted that Jaxon was having difficulties with the situation: (1) he was referring to Mikelle as "daddy's girlfriend"; (2) he stated that "daddy likes her better than he likes him"; and (3) he was having "nightmares that his mother is being killed". VRP (July 13, 2011), pp. 6-7, 9. The GAL did not believe Jason's idea of introducing Mikelle to the young boys at this stressful time was in the children's best interest. See Id. The court agreed and ordered Mikelle out of the custodial arrangement. VRP (July 13, 2011), p. 10; CP

92-95.

Jason's Contempt. On the morning of July 30, 2011, Maria had just finished cooking and eating breakfast with her boys, and was sweeping the kitchen floor. She noticed a cord coming out from under her refrigerator. She assumed it was attached to a toy. However, on pulling the cord she discovered a small speaker attached to a recording device. The device was on and recording. CP 113, 126-128 (pictures), and 129. At that time the device had logged 25 hours and 17 minutes -- precisely the amount of time that Maria had been enjoying in the house with her children. CP 124. Maria paid her counsel to prepare a proper motion to address this criminal and dysfunctional activity, and the court ordered Jason to show cause why an order of contempt should not be entered against him. CP 99-100, 106 (Order to Show Cause); VRP (September 1, 2011). At the hearing Jason admitted placing the bugging device, but insisted that he was just creating "a historic family document" of his own private moments with the children "singing and stuff like that". See VRP (September 1, 2011), pp. 15-16. This disingenuous argument was rejected by the court. See VRP p. 30 (September 1, 2011). The court imposed a monetary penalty of $500 on Jason and required that he purge the contempt by paying the

penalty and by removing and not in the future placing or allowing such devices to be placed in the residence. However, the court declined the imposition of attorney's fees connected with the incident. CP 161-164.

A motion for revision was filed with respect to the court's denial of fees to reimburse Maria on the contempt order. CP 169-170; VRP-September 16, 2011, p. 6. Maria's attorney argued that under the statute fees are mandatory where a contempt order is entered. VRP-September 16, 2011, pp. 9-11. The motion was denied. CP 176-177.

The Guardian Ad Litem. The court appointed Selene Becker as guardian ad litem ("GAL") to evaluate the best interests of the children pursuant to Chapter 26.09 RCW. CP 59-63, 52 and 160; Exhibit 67 (Confidential Report). At the time of her reporting, Jaxon was five and Phynix was three. Based on her investigation Ms. Becker recommended that Maria be granted primary residential placement of the children. Ex. 67, p. 12. Her recommendations were based on a number of observations including but not limited to: (1) Jaxon's apparent closeness and engagement with his mother, and their shared activities;[2] (2) Jaxon's expressed

[2] The guardian was unable to speak with Phynix due to the fact that he was

preference for Australia and the many relatives who live there; (3) an unannounced visit to the school that found Jaxon enjoying books purchased by his volunteering mother; (4) reports from Jaxon's teacher; (5) Jaxon's report that Jason's loud yelling at the children hurt his ear drum; (6) each parent's comparative willingness (and Jason's reluctance) to take recommended parenting classes ("Love and Logic") and counseling; (7) Jaxon's report that primary activities during time with Jason included watching T.V. and playing video games; (8) Jason's judgment that sharing the children's residential time with his live-in-girlfriend was appropriate; (9) the parents' tenuous residential status in the United States; and (10) the relative financial circumstances of each parent. Exhibit 67, pp. 3-11.

The Trial. A bench trial was held on this matter before Judge Frederick Fleming in late November 2011. VRP I, II, III, and IV. The parents' respective involvement and attention to the details of the children's lives was reflected in the testimony given at trial. See, e.g., VRP II, pp. 90, 93, 95-102. This testimony included the parents' difficulties in coordinating with one another on recommendations for school enrollment,

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only three years old and was more interested in playing during the counseling sessions.

and children involvement with swim lessons and other activities. See, e.g., VRP II, pp. 9-10. There was a striking contrast in the quality of evidence presented by each parent on their children's lives, routines, and best interests. Maria elaborated with compelling and loving detail her contributions to the children's upbringing since the time of their birth, and the ways in which she has sought to foster healthy routines and activities to further their best interests. See, e.g., VRP II, pp. 41-61, 90-122; Exhibit 67.

Jason provided evidence in support of his love and affection for the children as well, and the general nature of his parenting skills. In comparison to Maria's evidence, Jason's evidence was brief, and often non-specific or defensive. See, e.g., VRP I, pp. 11-87. Maria's case was supported with 70 admitted exhibits, including family photos, school enrollment and sign in records, cell phone records, and counselor and guardian reports. In contrast, Jason offered one exhibit – Exhibit 71 (Petitioner's Domestic Relations Information). See Exhibit Record.

Preliminary Rulings. At the close of evidence Judge Fleming announced what he was "thinking about doing". VRP III, p. 111. First, he described the two basic factors he was considering for his ruling. VRP III, pp. 111-113. Those factors were: (1) the fact that he was "less than happy with both sides... that pertains to credibility"; and (2) his finding that both

Jason and Maria loved Phynix and Jaxon. With respect to this latter factor, Judge Fleming elaborated:

> There are a lot of issues in training and nurturing and example that each side can provide that are positive coincide with intelligence which they probably got from their paternal and maternal mothers.

VRP III, pp. 111-112. With regard to this part of his analysis, Judge Fleming acknowledged that he actually had not "seen the father", and then queried with regard to the maternal father, "[I]s he still alive? Anyway." VRP III, p. 112.

Based on the foregoing factors, Judge Fleming announced a preliminary ruling that was "rolling through" his mind: (1) "50/50 distribution" of the property; (2) "50/50 also, parenting"; and (3) "the site [of the "50/50" parenting] it would seem to me they agreed upon some time ago was Pierce county". VRP III, p. 112. Finally, the court determined that if the parents were unable to work things out under his "50/50" rulings, then they could come back to the court for further direction – but with a warning that any obstinate or obstructive parent would pay the applicable fees. See VRP III, p. 113.

Closing Arguments. After the holiday weekend, the parties returned for closing arguments. VRP IV. Counsel for Jason had prepared

proposed papers for "the court's ruling last week". VRP IV, p. 3. Judge Fleming clarified "that it was not quite a ruling", and that he had wanted to give the attorney's a long weekend to consider what he had been thinking about. Id. Judge Fleming reiterated the factors motivating his decision making:

> The biggest part of it was that credibility was an issue. And the only thing that was able to, in my mind, overcome that was the children, the parties, what appeared to be their love for their children. But they are pretty selfish people. Now, with that, go ahead, say what you want to say.

VRP IV, pp. 3-4. For his closing argument, Jason's attorney said he supported the court's "50/50" plan, and said he did not feel any need to review the testimony:

> I believe that a fair shared parenting plan would be 50/50 where the children would remain in the North Tacoma area and split half time with each parent.

VRP IV, p. 4. Jason's attorney did not present any analysis of the statutory factors in RCW 26.09.187(3).

Maria's attorney presented a closing argument carefully outlining the evidence related to each of the statutory factors required for a court's ruling on child placement issues. VRP IV, pp. 10, 14-24. Based on the statutory criteria Maria asked that her proposed parenting plan be adopted by the court. VRP IV, pp. 23-24; CP 208-217. This parenting plan, as

recommended by the guardian ad litem, recognized Maria as the primary caretaker of the children. Exhibit 67; CP 208-217. Maria would alternate residential time with Jason on weekends and during each week. In addition, the plan would apply equally in Australia, the country of the children's birth, citizenship and extended family. CP 208-217; VRP II, pp. 117-118, 120.

Following the detailed statutory analysis, Jason's attorney offered a brief response which parroted the trial court's preliminary ruling:

> You honor, based on your guidelines last Friday for your thoughts last Friday, you had indicated that you wanted us to prepare and talk about a shared 50/50 parenting plan. You also indicated where you thought this matter should be set in Pierce County, and also found that if one person was to be obstinate or entrenched... that person will pay the fees.

VRP IV, p. 30. Judge Fleming agreed: "That will be the order of the court." VRP IV, p. 31.

At that point, Jason's attorney offered a parenting plan prepared over the preceding weekend based on Judge Fleming's preliminary rulings. VRP IV, pp. 31-32. With some modification, Judge Fleming finalized a plan which stuck to his vision of a "50/50" division of residential placement, community property, and corporate entities. He did not want to engage in calculations or valuations of assets, but awarded assets to the

divorcing parties as tenants in common. See VRP IV, pp. 32, 35, 38-39; CP 250-253. Before retiring, Judge Fleming left the parties with the following additional guidance:

> I'm speculating and trusting that they will not only do what's best for the children, but they will do what's best for these businesses because they're capitalists which is good and they're both capable. If they can make their choices and decisions based upon the good business and good child rearing, they will be successful. Does the petitioner think I overlooked anything?

VRP IV, pp. 38-39.

Final Rulings. A month later the parties returned to the court for the presentation of findings of fact and conclusions of law. VRP (December 23, 2011). Maria's attorney argued that the court's findings and conclusions should address the fact that the parties lived in Australia for some time. Judge Fleming ruled that this factor was irrelevant:

> They might have lived in Tokyo, do you want to put in there every place that they lived? The only relevant part is that they resided in Washington. I'll leave it the way it is.

VRP, pp. 6-7 (December 23, 2011); CP 244. The court stuck to its "50/50" rulings. VRP, p. 9 (December 23, 2011); CP 244; CP 222-233; CP 250-253. With regard to residential placement, the court's final parenting plan provides: "The children named in this parenting plan are scheduled to reside the majority of the time with each parent." CP 227. The court did

so over the objections of Maria's attorney, who reiterated that Maria should have been granted primary residential placement in light of the statutory factors, the evidence presented, the guardian ad litem report, and the proposed parenting plan. See Exhibit 67; CP 218-219. Maria filed a timely Notice of Appeal. CP 254-255.

IV. STANDARD OF REVIEW

A trial court's ruling on residential placement of children is reviewed for abuse of discretion. Shaffer v. Shaffer, 61 Wn.2d 699, 703, 379 P.2d 995 (1963); Thompson v. Thompson, 56 Wn.2d 244, 250-251, 352 P.2d 179 (1960) (custody decision reversed where based on speculative reasons not supported by the record). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Combs, 105 Wn. App. 168, 173, 19 P.3d 469 (2001); In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997); In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

A decision is based on untenable reasons if it applies an incorrect standard, or the facts do not meet the requirements of the correct standard. Combs, 105 Wn. App. at 173, quoting Littlefield, 133 Wn.2d at 47. The appellate court reviews de novo whether the trial court applied an incorrect

legal standard. State v. Lamb, 163 Wn. App. 614, 625, 262 P.3d 89 (2011). Statutory construction is a matter of law and is also subject to de novo review. Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 806, 929 P.2d 1204 (1997).

An appellate court will also reverse where it is unable to determine the basis for the trial court's ruling or what standards were followed. In re Cabalquinto, 100 Wn.2d 325, 329, 669 P.2d 886 (1983) (citations omitted).

V. SUMMARY OF ARGUMENT

This case involves the rights of parents and children to have a child's residential placement reviewed in accordance with the mandatory factors established in RCW 26.09.187(3). In this case the trial court refused to analyze the mandatory statutory factors and instead applied a shorthand subjective legal standard based on two simple findings: (1) none of the witnesses were credible; but (2) both parents loved their children. Based on these simple findings the court entered an equally simple decision: the children's residential placement would be shared "50/50", and the parents should work out any problems, or else return for court intervention under a threat of attorney's fees.

The foregoing ruling should be reversed as an abuse of discretion. When it comes to a parenting plan, the trial court has a fundamental

responsibility to carefully apply the statutory framework and craft a plan that properly protects the children's best interests. In this case, the evidence (including the recommendations of the guardian ad litem) overwhelmingly supported an award of residential placement to the mother, Maria.

In addition to a remand for a proper ruling on the parenting plan, the trial court must also correct its failure to reimburse Maria with the legal expenses mandated by RCW 26.09.160(2)(b). Maria was justified in pursuing an order of contempt based on Jason's criminal invasion of her family privacy, and an award of expenses is mandatory.

VI. ARGUMENT

A. The Parenting Plan Should Be Remanded For Review Under The Objective Factors Of RCW 26.09.187(3), Which Are Required For Determining A Child's Best Interests.

The major purpose behind the requirement of a detailed permanent parenting plan is to ensure that parents have a well thought out working document with which to address the future needs and best interests of the children. In re Marriage of Pape, 139 Wn.2d 694, 705, 989 P.2d 1120 (1999) (quoting 3 WASH. STATE BAR ASS'N, FAMILY LAW DESKBOOK § 45.3(3) (rev. ed. 1996)); see RCW 26.09.002 (best interests standard); .004(3) (parenting functions necessary for care and growth); .184

(parenting plan objectives and content).

In ordering a parenting plan, the trial court is required to provide for the residential placement of the child. The residential placement is to be in the child's best interests and "is to be made only after certain factors have been considered by the court." In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993), citing RCW 26.09.187(3). The seven factors that the trial court "shall consider" when determining residential placement provisions include:

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
> (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
> (iv) The emotional needs and developmental level of the child;
> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
> (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.
>
> Factor (i) shall be given the greatest weight.

RCW 26.09.187(3)(a). These factors are necessary to guide the trial court in a careful and objective review process towards the fundamental goal of

achieving the child's best interests. Kovacs, 121 Wn.2d at 803.

The importance of determining the children's best interests in accordance with the objective factors is underscored by many cases reversing trial courts for failing to properly evaluate the factors. Kovacs, 121 Wn.2d at 809; In re Combs, 105 Wn. App. 168, 176-177, 19 P.3d 469 (2001); Murray v. Murray, 28 Wn. App. 187, 189-190, 622 P.2d 1288 (1981); In re Marriage of Waggener, 13 Wn. App. 911, 538 P.2d 845 (1975); Shaffer, 61 Wn.2d at 703; Thompson, 56 Wn.2d at 250-251.

For example, in Murray, even though substantial evidence supported the trial court's ruling, the Court of Appeals reversed because the record did not reflect a careful consideration of the mandatory factors:

> Although the trial record contains substantial evidence to provide a basis for analysis of the statutory factors, particularly the child's relationship with others, we cannot find the court made its determination by applying those statutory factors. Any presumption that the trial court considered the statutory factors is rebutted by the failure of the written findings or oral opinion to reflect any application of the statutory elements . . .

Murray v. Murray, 28 Wn. App. 187, 189-190, 622 P.2d 1288 (1981). Accordingly, the Court of Appeals remanded the case for resolution of the basic issue "in accordance with the statutory mandate." Id. at 190.

A similar problem arose in Combs, where the Court of Appeals

expressed the difficulty of reviewing a trial court's ruling on the residential placement of a child where the factors are not analyzed:

> [T]he court's findings do not relate specifically to any of the factors identified by the Legislature as relevant to the determination. See RCW 26.09.187(3)(a). Without an examination of those statutory factors, it is impossible to determine on what basis the court ultimately concluded Ms. Combs should be the primary residential parent. The result is that the court's decision was not based on tenable reasons and was an abuse of discretion.

In re Combs, 105 Wn. App. 168, 176-177, 19 P.3d 469 (2001). This failure to examine the factors, as well as an apparent presumption in favor of the pre-trial residential status quo, was an abuse of discretion. Id.

In this case, Maria presented detailed evidence and argument explaining how each of the statutory factors under RCW 26.09.187(3) favored a parenting plan under which she would serve as the primary residential parent. See VRP IV, pp. 10, 14-24 (detailed factors analysis); Exhibit 67 (GAL Report). Despite this evidence and argument Judge Fleming refused to give any consideration to the statutory factors, either in his oral or his written rulings. This was an abuse of discretion that by legislative definition violated the fundamental right of all interested parties to a parenting plan that objectively furthers the children's best interests.

B. The Court's Shorthand "50 / 50" Child Placement Ruling Was Based On An Erroneous Two Factor Legal Standard.

The record reveals that Judge Fleming's parenting plan provisions were based on two simple factors: (1) both parents' lack of credibility; and (2) both parents' love for their children. See VRP III, pp. 111-112; VRP IV, pp. 3-4. While Judge Fleming spoke fondly of each parent's obvious love for the children, this was insufficient to support his failure to decide the best interests of the children in light of the objective factors.

An analogous case is Murray, where the trial court focused on the parents' loving relationship with the children, without regard to the custodial factors. In reviewing the decision, the appellate court recognized the temptation to look for simple "love-based" solutions:

> A trial court making a child custody award may give significant consideration to the child's need for a warm and loving relationship and to each parent's unique ability to fulfill that need, so long as it also gives weight to the statutory custodial factors. We are mindful of the disconcerting fact that resolution of child custody problems often "tax the wisdom of Solomon." In re Walker, 43 Wn.2d 710, 719, 263 P.2d 956 (1953). Nevertheless, we caution trial courts not to resort to short-cut phraseology . . .

Murray v. Murray, 28 Wn. App. 187, 191, 622 P.2d 1288 (1981). The court elaborated that resort to "shorthand" principles which sidestep review of the objective factors allows judges to interject subjective views without

the necessary thoughtful analysis. Such simplification tends to:

> undermine the statutory scheme, lead to cursory fact finding, and encourage judges to interject their own personal beliefs .... Instead, each case should be based on a thoughtful, individualized determination.

Murray, 28 Wn. App. at 191. The dangers of oversimplification were also addressed in Chatwood, where the Supreme Court discussed the trial court's responsibility to actually make a residential placement decision based on the difficult, complex questions inherent in such decisions:

> Obviously, custody is not to be given to both parents. Although the responsibility imposed upon the courts frequently presents a most difficult question as to what custody disposition will best serve the interests and the welfare of the children, the responsibility must be met. It cannot be side-stepped by the judges of our courts for more pleasing, strictly personal, or other pursuits, as sometimes happens in the case of too many parents. Feelings of uncertainty on the part of judges in disposing of complicated custody matters are not eased by knowledge of our alarmingly high rate of juvenile delinquency, or by an awareness of the fact that even the best-intentioned and the most intelligent parents, unfortunately, are often not too successful in trying to figure out what would be most conducive to the best interests and welfare of their children.

Chatwood v. Chatwood, 44 Wn.2d 233, 239, 266 P.2d 782 (1954).

The foregoing principles apply with obvious force in this case, where the trial court dispensed with any apparent consideration of the statutory factors (or the guardian's relevant treatment of those factors), and

resorted to a cursory finding that both parents love their children, and should therefore can be trusted to work things out under a simple "50 / 50" responsibility. See VRP III, pp. 111-112; VRP IV, pp. 38-39 ("I'm speculating and trusting that they will [] do what's best for the children ..."). This decision should be reversed. Where the residential placement of a child is disputed, the trial court must engage in the important analytical lifting required for a thoughtful parenting plan. It is a disservice to the children and their parents where the court ignores the testimony of all witnesses as lacking credibility, discards the recommendations of the guardian ad litem, and then punts the ball to the divorcing parties based on speculation that they can "work it out" – and if they don't, they must return to court under a threat of attorney's fees for being obstructionist. See VRP III, pp. 112-113; VRP IV, p. 31. The trial court's short cut analysis failed to achieve the best interests of the children under the required factors, and was an abuse of discretion.

C. The Trial Court Erred When It Ruled Without Regard To Witness Testimony Or The Recommendations Of The Guardian Ad Litem.

The trial court also erred when it ignored the recommendations of the guardian ad litem despite finding that neither the parents nor the witnesses were credible. See VRP IV, pp. 3-4. When a court determines

that the parents cannot be relied upon to develop the relevant facts, reliance on the report of the guardian ad litem is all the more important. The guardian's statutory purpose is to serve the court as an independent tool for investigating and reporting on facts which bear upon the children's best interests. See RCW 26.09.210 and .220; In re Marriage of Waggener, 13 Wn. App. 911, 538 P.2d 845 (1975). The court's failure to do so in this case was an abuse of discretion.

In Waggener, this Court addressed the guardian ad litem's important role in helping the trial court evaluate the objective statutory factors. In that case the trial court awarded primary residential placement of the son to the father. On appeal the mother argued that the trial court failed to consider one of the relevant statutory factors, and also that the court should have utilized procedures (such as the appointment of a guardian ad litem) to properly investigate the relevant circumstances. Waggener, 13 Wn. App. at 914; see RCW 26.09.220 (authority to appoint guardian ad litem).

In its review the Waggener Court was particularly concerned with the failure of both the trial court and the parties to develop a factual record on the statutory factors pertaining to the child's best interest:

> [W]here a serious custody dispute is presented, and where the parties have omitted presenting any evidence on one or more relevant factors specified in RCW 26.09.190

> [predecessor to RCW 26.09.187(3)], a case is presented where the trial court should act affirmatively to cure the deficiencies in the evidence.

Id. This Court emphasized the importance of appointing experts as a tool to assist trial courts in reaching an objective, rather than subjective evaluation of the issue. Id. at 917. This tool is particularly important where the residential placement of the child is disputed by parents who both appear to be fit:

> where from the surface at least, both parties appear to be fit parents, and where the parties fail in their proof to adequately develop the relevant factors set forth in RCW 26.09.190 [now .187(3)], the court should either appoint an attorney for the child or otherwise order an investigation of those relevant factors, to the end that an objective decision may be made to serve the best interests of the child.

Based on this analysis this Court reversed and remanded for a new hearing where the trial court would be required to evaluate the relevant statutory factors with the assistance of a court appointed attorney or guardian, and inquire into the prospective custodial relationships for the child.[3] Id. at 917.

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[3] It should be noted that in Waggener, as here, the father had been sharing his pre-trial residential time with a girlfriend. The Court was concerned with the lack of testimony on the effect of this arrangement on the child, or on his relationship to his prospective stepmother. Id. at 916.

Here, there was an ample record on the required statutory factors supporting primary residential placement with Maria. See, e.g., VRP IV, pp. 10, 14-24. In addition to witnesses and exhibits, this evidence including a formal report of the court appointed guardian ad litem, Selene Becker. Exhibit 67. Although the trial court expressed concerns with witness credibility on both sides, he nonetheless chose to disregard the findings and recommendations of the guardian and embarked on his own subjective analysis that because both parents loved their children, they should "reside the majority of the time with each parent". CP 227. This was an abuse of discretion. To the extent that the trial court was dissatisfied with the record before it, it was obligated to utilize the statutory tools of RCW 26.09.210 and RCW 26.09.220 to develop that record and make a decision on residential placement in the child's best interests.

D. The Trial Court Abused Its Discretion When It Ruled That The Children's Life In Australia Was Irrelevant.

In this case Judge Fleming callously refused to consider the children's connections to Australia. He believed that the children's lives in that country were irrelevant. See VRP pp. 6-7 (December 23, 2011). This was an abuse of discretion. The fact that the children were born and raised as Australian citizens was very relevant. Australia was the

residence that Jaxon stated he preferred. It was the only place where he and Phynix were surrounded by an extended and nurturing group of family and friends, independent from the divorcing parents. See, e.g., VRP III, p. 59; RCW 26.09.187(3) (a)(iv) (emotional needs factor); (a)(v) (relationship with other significant adults, other physical surroundings, and activities); (a)(vi) (wishes of the parents and the child).

It was also an abuse of discretion not to award primary residential placement to Maria, given the tenuous and unstable nature of Jason's expiring alien residency in the United States. Jason was a Canadian citizen whose alleged basis for United States residency was based on fraudulent papers and a non-existent business. VRP III, pp. 90-96. Jason admitted that the business on which the children's residency depended had collapsed long ago. VRP III, p. 96; Exhibits 25-29. Jason also admitted that he misrepresented a 70% ownership in Frontier Commodities to the federal government in order to procure residency in the United States. VRP III, pp. 90-91. It is a violation of federal law to procure entry into the United States based on fraud or willful misrepresentation. See 8 U.S.C. § 1182(a)(6)(C); see also Kungys v. United States, 485 U.S. 759, 772, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988); Forbes v. INS, 48 F.3d 439, 442 (9th Cir. 1995) (an alien's misrepresentation is a basis for exclusion from the

country). Under these circumstances, consideration of children's lives in Australia was not merely relevant to the parenting plan – it was imperative.

Moreover, there was no legal justification for a presumption that the parents' temporary agreement on a shared residential schedule in Pierce County should remain permanent after trial. VRP III, p. 112 (suggesting Maria agreed to remain in Washington). In Kovacs, the Supreme Court ruled that a temporary residential placement of a child must not be given an unfair preference in the permanent parenting plan. In re Marriage of Kovacs, 121 Wn.2d 795, 808-809, 854 P.2d 629 (1993). A pre-trial residential placement is designed to minimize disruption to the child's emotional stability during the "highly chaotic and emotionally stressful time" of parental litigation. Kovacs, 121 Wn.2d at 809; RCW 26.09.197. This factor is not considered when developing the residential provisions of a permanent parenting plan: "In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan." Id. quoting RCW 26.09.191(5). The permanent plan is based on what makes sense for parenting in the future:

> In the permanent parenting plan, the court is to evaluate the ability of each parent to perform the parenting functions for each child prospectively. Drawing any presumption from the temporary plan is inappropriate.

Kovacs, 121 Wn.2d at 809, quoting Washington State Bar Ass'n, Family Law Deskbook 45-25 (1989). In this case, the trial court improperly ignored the children's fundamental connection to Australia. Those connections were fundamental in both a legal and factual sense. The unrefuted evidence at trial confirmed Australia as the happiest and most supportive environment the children had ever known. It was also the only residential environment not under legal jeopardy. The court should not have blinded itself to a parenting plan that took into account the children's strong connections to Australia.

E. The Trial Court Should Have Awarded Maria Primary Residential Placement Based On Overwhelming Evidence Under RCW 26.09.187(3), And Factors Undermining Placement With Jason.

As discussed, the trial court erred when it failed to analyze the objective factors for determining the best residential provisions for the children, applying an erroneous shorthand legal standard, and failed to consider the children's legal and factual connections to Australia. This Court, in reviewing this case under the objective factors, should remand for a ruling directing the court to immediately enter a parenting plan based on the mother's proposal for primary residential placement. This ruling is justified by the overwhelming evidence of the children's best interests.

Maria was also the only party to present a parenting plan that was based on the objective factors analysis required under RCW 26.09.187(3). See VRP IV, pp. 10, 14-24. The guardian ad litem's investigation corroborated Maria's proposal. See Exhibit 67. Maria, Jason, Jaxon and Ms. Becker all recognized the important loving relationships established during the children's upbringing in their home country of Australia – the only legally stable residence with an extended family aside from the parents supported by the record. Exhibits 35 and 67; VRP I, pp. 43 (Jason Ehlert), 100-101, 105-111, 113-114, 117; VRP III, pp. 4-5. The best interest of the children is to award primary residential placement to Maria, the parent who was clearly in the best position to maintain a strong, supported and stable relationship, fulfill the parenting functions in a reliable manner, foster the children's wishes and emotional needs for their extended family, and pursue a stable and flexible employment schedule that is not based on the father's fraudulent business plan for a defunct business risking immediate exclusion from the alleged majority owner's country of residence.

F. The Trial Court Abused Its Discretion When It Failed To Award Ms. Spuria-Ehlert The Reasonable Expenses Of Her Successful Motion For Contempt.

The trial court also abused its discretion when it failed to award Maria the reasonable expenses of bringing her successful motion for

contempt, based on Jason's criminal act of bugging her private residential time. When the court holds a party in contempt, the award of expenses is mandatory under RCW 26.09.160(1):

> An attempt by a parent . . . to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.

RCW 26.09.160(1) (emphasis supplied). The mandate for an award of expenses associated with the contempt motion is repeated in RCW 26.09.160(2)(b), with regard to residential provisions:

> If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court. Upon a finding of contempt, the court shall order: ...
>
> (ii) The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child; ....

In this case, Maria was forced to bring a motion for contempt, and she prevailed. The trial court abused its discretion when, despite finding Jason in contempt, it refused to reimburse Maria with the reasonable attorney's fee incurred as a result of Jason's misconduct. On remand, this error should be remedied with an award of reasonable expenses.

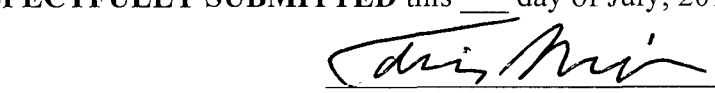
G. Maria Is Also Entitled To Attorney's Fees On Appeal.

Pursuant to RAP 18.1, Maria asks for reasonable attorney's fees associated with her appeal. In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. Thompson v. Lennox, 151 Wn. App. 479, 484, 212 P.3d 597 (2009); Landberg v. Carlson, 108 Wn. App. 749, 758, 33 P.3d 406 (2001), review denied, 146 Wn.2d 1008 (2002). Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well. Id. (citing RAP 18.1). Here, Maria has been forced to appeal her statutory right to fees and, upon prevailing, should recover associated appellate fees.

VII. CONCLUSION

The appellant, Maria Spuria-Ehlert, respectfully asks this Court reverse and remand for entry of a parenting plan based on the objective factors necessary to achieve the best interests of the children. In addition, she asks that this Court confirm her right to fees and costs associated with Jason's contempt, including reasonable fees on appeal.

RESPECTFULLY SUBMITTED this 25th day of July, 2012.



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COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

In re the Marriage of: JASON EHLERT, Respondent, And MARIA SPURIA-EHLERT, Appellant.	No. 42990-0-II **DECLARATION OF SERVICE**

THE UNDERSIGNED, hereby declares as follows:

That I am now and at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to the above entitled action and competent to be a witness therein. That on the 25th day of July, 2012, she placed a true copy of the Appellant's Brief on file in the above-entitled matter, in an envelope addressed to Theodore C. Rogge and Selene Becker, at the addresses below stated and also transmitted a copy to Theodore C. Rogge by electronic

service to Rogge Law info@roggelaw.com per agreement of the parties:

Theodore C. Rogge
Rogge Law Offices
3211 6th Avenue
Tacoma, WA 98406

Selene Becker
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Issaquah, WA 98006

That she placed and affixed proper postage to the said envelope, sealed the same, and placed it in a receptacle maintained by the United States Post Office for the deposit of letters for mailing in the City of Puyallup, County of Pierce, State of Washington. That she mailed the envelope first class, postage prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Puyallup, Pierce County, Washington this 25th day of July, 2012.

Michelle A. Lea